

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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DARRYL LAYTON,

Petitioner,

-v.-

ORDER

04 Civ. 4032 (DRH)

WILLIAM PHILLIPS, Warden of Greenhaven
Correctional Facility, and GLENN S. GOORD,
Commissioner of New York Department of
Corrections

Respondents.

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HURLEY, District Judge:

By Memorandum and Order dated February 13, 2008 this Court denied the petition for habeas corpus. Presently before the Court is Petitioner's application for a certificate of appealability.

Rule 22(b) of the Federal Rules of Appellate Procedure provides that "[i]n a habeas corpus proceeding in which the detention complained of arises from process by a state court . . . the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c)."

Section 2253(c) provides that "[a] certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A "substantial showing" does not require that a petitioner demonstrate that he would prevail on the merits in his appeal, but only that the issues he raises are debatable among jurists of reason; that a court could resolve the issues differently; or that the questions are adequate to deserve encouragement to proceed further. *See Miller-EL v. Cockrell*, 537 U.S. 322, 336 (2003);

Barefoot v. Estelle, 463 U.S. 880, 893 n.4; *Middleton v. Att'ys Gen'l of the States of New York*, 396 F.3d 207, 209 (2005).

In this Court's view, the Petitioner has satisfied his burden for a certificate of appealability with regard to the issues of whether the photographic "show-up" was impermissibly suggestive and whether the failure to disclose the pending civil lawsuit constituted a *Brady* violation. Reasonable jurists could debate these issues.

Accordingly, the Court grants the certificate of appealability.

SO ORDERED.

Dated: Central Islip, New York
March 13, 2008

/s/

Denis R. Hurley
Senior District Judge